No. 14539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF

LOS ANGELES COUNTY PIONEER SOCIETY, a Corporation,

Debtor.

Reply of Historical Society of Southern California to Opening Brief of Los Angeles County Pioneer Society.

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Introductory Statement.

Appellant, a public charitable corporation, was, in 1950, by final judgment of the State Court, adjudged faithless to its trust, shorn of its property, and required to account, wind up its affairs, and dissolve; Historical Society of Southern California was appointed successor trustee and invested with title to the entire assets of the trust.[1]

Following affirmance of the judgment, time for the accounting was fixed for July 27, 1954.[2]

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[1]*In re L. A. County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society, et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc. Interveners and Respondents* (1953), 40 Cal. 2d 852.

[2]Tr. 7-30-54, p. 27, line 5.

On July 26, 1954, appellant filed in the Bankruptcy Court petition "for arrangement" under Chapter XI of the Bankruptcy Act, sworn to by its President. Therein it says nothing about the judgment, alleges that it is a "non-profit" corporation,[3] that it *owns* the assets of which it had been shorn by the judgment,[4] that Historical holds said assets as trustee for Pioneer,[5] and asks the Bankruptcy Court to take said assets away from Historical, pay therefrom expense incurred by appellant in betraying and despoiling the trust and reinstate appellant in ownership and possession of the remainder,[6] with specific authority to dispose thereof in accordance with appellant's amended by-laws which had been adjudged fraudulent by the State Court.[7]

In presenting the petition appellant's correct status and the nature of the pending accounting proceeding were misrepresented,[8] and the existence of the final judgment of the State Court concealed.[9]

July 26, 1954, appellant obtained an order (served July 27, 1954) restraining proceedings in the State Court.[10] Request that the order be vacated was immediately made

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[3]Pet. for Arr. p. 1, lines 22-23.

[4]Pet. for Arr. p. 4, lines 17-19; p. 5, lines 1-4; p. 7, lines 11-14.

[5]Pet. for Arr. p. 7, lines 11-14.

[6]Pet. for Arr. p. 4, lines 17-27; p. 5, lines 1-4; p. 6, lines 22-25.

[7]40 Cal. 2d 862-863. Pet. for Arr. p. 1, line 23; p. 3, lines 28 *et seq.;* p. 4, lines 17-19; p. 4, lines 21-26; p. 7, lines 11-14.

[8]Pet. for Arr. p. 1, lines 22-23; Pet. for Order to Show Cause, Pars. I and II.

[9]Tr. 7-30-54, p. 41, lines 10-14; p. 42, lines 19-21; p. 43, lines 9-10; p. 44, line 21; p. 47, lines 22-24; p. 48, lines 13-15; p. 49, lines 18-20; p. 51, lines 13-16.

[10]Restraining Order, p. 1.

to Judge Harrison. Pursuant to arrangement made by him with Judge Mathes, hearing was held by the latter July 28 and 30, 1954, which was participated in by all parties without objection.[11]

Thereat, the facts about the judgment, appellant's corporate status, the accounting proceeding, and the falsity of the petition were admitted.[12]

On July 28, 1954, the restraining order was vacated,[13] and on July 30, 1954, the petition for arrangement was dismissed.[13a]

This appeal followed.

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[11]Tr. 7-28-54, p. 2; p. 14, line 17; p. 15, line 14; p. 18; pp. 20-22; p. 26, line 19; p. 28, lines 3-19; p. 30, line 14; p. 31, lines 10-20; p. 37, lines 2-16; p. 38, line 7; p. 39, line 4; p. 40, lines 5-21; pp. 41-44. Tr. 7-30-54, pp. 2-7.

[12]Op. of State Supreme Court, 40 Cal. 2d 852, Tr. 7-28-54, p. 36, lines 10-21.

Impounding order, Tr. 7-30-54, p. 38.

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[13]Tr. 7-28-54, p. 37, line 17.

[13a]Tr. 7-30-54, p. 54, lines 18, *et seq.*

Disregard in the Opening Brief for conclusive adjudications against appellant, and other undisputed and indisputable matters upon which the vacation of restraining order and dismissal of the petition were based, renders statement thereof necessary.

The Facts.

Los Angeles County Pioneer Society was, in 1921, and, again, in 1953, adjudged to be a California corporation organized and existing for a single public charitable purpose.[14]

In each case appellant's contention that it is a *non-profit social,* and *not a charitable,* corporation, was rejected.

The second case, initiated in 1949, by petition sworn to by Pioneer's President, Frank Y. Pearne (who likewise verified the petition for arrangement herein), is the same case No. 562960 entitled "In the Matter of Los Angeles County Pioneer Society, a corporation, in the Process of Voluntary Winding Up" referred to in Paragraph I of the "Petition for Order to Show Cause Restraining Proceedings in the Superior Court." Therein Pioneer, claiming to be "a non-profit" corporation, sought to dissolve and divide its property *pro rata* among its members. The Attorney General intervened, alleging abandonment of the trust, *mala fides* in its administration, Pioneer's intention to misappropriate the trust assets, and abuse by

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[14]*In the Matter of the Estate of Victor Dol, Deceased, Los Angeles County Pioneer Society, Respondent, v. Frank P. Flint, et al., Executors, Appellants* (1921), 186 Cal. 64.

In re L. A. County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society, et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc., Interveners and Respondents (1953), 40 Cal. 2d 852.

Pioneer of its corporate powers and privileges. The Attorney General's allegations included: public policy requires that the assets in Pioneer's possession "remain charged with the public charitable and benevolent trust * * * to the end that the trust may not fail;"[15] that Pioneer had not, for more than five years devoted the assets to the public charitable trust;[16] that by the dissolution proceeding, Pioneer was "seeking to dispose of the Society's assets contrary to the public and charitable purpose," to the irreparable injury of the People of the State.[17]

Prayer is for Pioneer's *dissolution and disposition of its assets in such manner that they will remain dedicated to the trust.*[18]

On the filing of the complaint $95,187.37 in Pioneer's possession was impounded,[19] which, after judgment, was turned over to Historical Society of Southern California as successor trustee.

May 18, 1950, the court found that Pioneer had abandoned the charitable purposes for which it was organized; that it was seeking and intending to wrongfully divert the trust assets to the private enrichment of its individual members; and that Pioneer's closing of its membership rolls, obtaining, in a declaratory relief action wherein it paid the attorneys on both sides, judgment that its assets were subject to no trust, and initiating the proceeding to dissolve and distribute its assets among its members, were all in pursuit of the unlawful purpose to wrongfully divert the trust assets to the private use of

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[15]Clk. Tr. p. 14, line 18.
[16]Clk. Tr. p. 15, line 24.
[17]Clk. Tr. p. 13, line 26, to p. 14, line 14.
[18]Clk. Tr. p. 15, lines 5, *et seq.*
[19]Clk. Tr. p. 71; Tr. 7-30-54, p. 38.

Pioneer's members; the court concluded that the property in Pioneer's possession is *corpus* of the charitable trust for which Pioneer was incorporated; that Pioneer had abandoned, betrayed and abused the trust, that appointment of a successor trustee, accounting by Pioneer, *and the taking of all competent action by it to conclude and dissolve the corporation were necessary.*[20] It entered interlocutory judgment that Pioneer had abandoned, been faithless to, and threatened and intended to despoil the trust, and that a new trustee was necessary; it directed Pioneer to account and report to the court, and, on the approval of the account and report, *to wind up its affairs and dissolve.*[21]

October 18, 1950, Historical Society was appointed successor trustee, all trust assets were ordered delivered to it, and the impounded assets were turned over to the successor trustee.[22]

December 16, 1950, Pioneer appealed from the judgment,[23] which was affirmed May 5, 1953,[24] and certiorari denied by the Supreme Court of the United States January 4, 1954.[25]

In affirming the judgment, the State Supreme Court reviews in detail appellant's conduct, holds that all property acquired by Pioneer, including the particular gifts, devises and bequests referred to in the petition for arrangement, is subject to the trust; that a declaratory judgment to the contrary in the case wherein Pioneer was

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[20]Clk. Tr. pp. 47, *et seq.*
[21]Clk. Tr. pp. 51-53; Tr. 7-28-54, p. 31.
[22]Clk. Tr. p. 81; Tr. 7-30-54, pp. 9-12.
[23]Clk. Tr. p. 54.
[24]See 40 Cal. 2d 852, *supra.*
[25]346 U. S. 888 and 928.

plaintiff and paid the attorneys on both sides, and to which the Attorney General was not a party, was colorable and ineffective; that Pioneer's members had no proprietary right, title or interest in the property; that an amendment to the corporation's by-laws closing membership and declaring that existing members have such proprietary interest is invalid; that a charitable corporation cannot dissolve and divide its property among the members, and that Pioneer cannot lawfully make such distribution. The Court concluded that, by the course of conduct recited, and by maintaining "in the trial court, in a petition for writs of prohibition and mandate, and on this appeal that its assets are not held for charitable purposes," Pioneer demonstrated "that it has abused and abandoned its trust and amply supports the determination of the trial court that a new trustee should be appointed."[26]

Upon return of the case to the Superior Court, and on June 29, 1954, Pioneer's request to that court for payment out of the trust funds of Lavine's attorney's fees and expenses ($13,000.00) in and since the appeal was denied.[27] At the same time, on Mr. Lavine's representation to the court that accounting would be made as required by the judgment, July 27, 1954, at 10 a.m., was fixed as the time therefor.[28]

Instead of the promised accounting, appellant filed the petitions for arrangement and for restraining order, which were presented to the Bankruptcy Court by Mr. Lavine. The restraining order, signed by District Judge Harrison, was issued July 26, 1954, and served on Judge Pope of the Superior Court at 10 a.m., July 27, 1954.

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[26]40 Cal. 2d 861-862.

[27]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6; p. 24, line 6. Tr. 7-30-54, p. 26, line 21.

[28]Tr. 7-30-54, p. 27, line 5.

Allegations of the Petitions.

The petition for arrangement alleges that Pioneer is a *"non-profit"* corporation; that it *owns* the impounded $95,263.67; that Historical Society holds the money *as trustee for Pioneer,* and, *as such trustee* for Pioneer, has bought stocks and bonds with the money. The petition proposes and asks that the assets be taken away from Historical by the trustee to be appointed by the Bankruptcy Court, that the bankruptcy trustee pay therefrom Pioneer's debts (being Pioneer's fees and expenses incurred by it "in these proceedings") and turn the remainder over to Pioneer *to be used in accordance with its* (unlawful) *by-laws.*

The petition for restraining order, concurrently filed and presented, alleges (Par. II) that in State Court Proceeding No. 562960 Pioneer "revoked the said proceeding and petitioned the court for revocation of its previous proceedings to voluntarily wind up its affairs and to allow it to continue and allow it to restore its funds and meet its obligations,"[29] and that the Superior Court "has announced that it will not permit" Pioneer "so to do," and will, on July 27, 1954, at the hour of 10 a.m. dissolve the Society.[30]

The truth about State Court Proceeding No. 562960, the judgment therein, and the true status of that case on July 26, 1954, were concealed from the District Court

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[29]The revocatory proceding was held ineffective by the State Supreme Court (see 40 Cal. 2d 864).

[30]Dissolution can, under the judgment, take place only *after* settlement of the accounting. The record contains no support for this allegation in the petition.

when the petitions were presented and the restraining order issued.[31]

Following service of the restraining order on Judge Pope, District Judge Harrison was asked to vacate the order. Being engaged in a trial, Judge Harrison arranged with Judge Mathes to hear the matter; responsive to notification from Judge Mathes, all parties appeared in open court, and the hearing, participated in by all parties without objection, was proceeded with on July 28th and concluded July 30, 1954.[32]

At the hearing Mr. Lavine informed the court that the obligations "incurred in these proceedings," referred to in and payment of which is asked by the petition, amount to $13,413.71; that $13,000.00 thereof was for Lavine's fees and expenses, and that claim therefor had been presented to and disallowed by the Superior Court.[33]

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[31]Tr. 7-30-54, p. 40, line 12, to p. 41, line 14.

[32]For particulars as to presentation of the petitions, arrangement for hearing by Judge Mathes and participation of appellant and all other parties in the hearing, see:

Tr. 7-28-54, p. 2, lines 3-22; p. 11, lines 1-25; p. 14, line 17. Tr. 7-30-54, p. 2, line 1, to p. 8, line 1; p. 18, line 1, to p. 19, line 8; p. 24, line 1, to p. 25, line 17; p. 28, lines 1-6; p. 31, lines 9-11; p. 34, line 24, to p. 35, line 1; p. 36, line 6, to p. 37, line 11; p. 40, line 1, to p. 41, line 14; p. 46, lines 5-13.

[33]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6; p. 24, line 6. Tr. 7-30-54, pp. 26-27.

As Lavine's services commenced with the notice of appeal from the judgment in case No. 562960, filed December 16, 1950, they were entirely in support of the conduct of Pioneer, which the Supreme Court held demonstrated abandonment, abuse, betrayal and spoliation of the trust.

Rewarding a faithless trustee for activities in fraud of his fiduciary relationship is, of course, judicially unthinkable. Besides, the Superior Court, the proper tribunal to consider the matter, had adjudicated the claim [Tr. 7-28-54, p. 24, line 6; Tr. 7-30-54, pp. 26-27].

At the hearing, responsive to the Court's questions, Lavine admitted that the only title Pioneer *ever had or could claim* to the assets (of which, in the petition, Pioneer alleges outright ownership) was as trustee, and that the judgment in Case No. 562960, ending its trusteeship, taking the title away from Pioneer and vesting it in Historical Society as successor trustee, was final.[34]

Pioneer also admitted that by the judgment which was affirmed in 40 Cal. 2d 852, title to the "in excess of $95,000.00" mentioned in the petition for arrangement had been vested in Historical Society as trustee and that the judgment has been final ever since 1953.[35]

The Adjudications and Appellant's Admissions Left No Alternative to Vacating the Restraining Order and Dismissing the Petition.

Contrast between the petition for arrangement and conclusive adjudications and other facts admitted by appellant and with which both Pioneer and its attorney were especially familiar, is so striking as to require no comment.

The opening brief admits that on Pioneer's accounting, which was proceeded with after vacation of the order, the court surcharged Pioneer $7,578.76, with interest, for misappropriated trust funds.[36]

Thus, adjudged faithless as trustee and flaunting the requirement that it account for its trusteeship, its hands unclean with misappropriated trust funds, appellant, on July 26, 1954, presented to the District Court a false

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[34]Tr. 7-28-54, p. 23, line 11; Tr. 7-30-54, p. 40, lines 12 and 21.

[35]Tr. 7-28-54, p. 20, line 17; p. 23, line 19; p. 40, line 18. Tr. 7-30-54, p. 36, line 9.

[36]Op. Br. p. 9, line 18.

petition, asking judicial seizure of trust property in which Pioneer admits it has no right, title or interest, payment therefrom by the court of obligations incurred by Pioneer in betraying and despoiling the trust, and reinstatement of appellant in possession of the remaining trust assets, with specific authority to dispose thereof in accordance with its (unlawful) amended by-laws.[36a]

Relying on these allegations and uninformed about and without knowledge of the judgment, Judge Harrison signed the restraining order. Upon disclosure at the hearing of the facts and the gross imposition on the District Court, the order was vacated and the petition for arrangement dismissed.

Thus, frustrated by the State Court judgment in its attempt to fraudulently use the *State* process of dissolution to spoliate the betrayed charitable trust, and being thereby ordered to account and dissolve, appellant here sought to similarly utilize the *Federal* process prescribed by Chapter XI of the Bankruptcy Act, and, by dissimulation, misrepresentation, concealment, downright falsehood and deception, to thereby evade the judgment, escape accounting and dissolution, and be reinstated in possession and ownership of trust property, in which it confessedly had no shadow of right, title or interest, with specific authorization to dispose of the property in a manner adjudged fraudulent by the State Court.

A more brazen imposition on a court or a more flagrant abuse of judicial process could not be imagined.

The applicable law is elementary:

> " 'It is one of the fundamental principles upon which equity jurisprudence is founded, that *before a*

[36a] See 40 Cal. 2d 861-862.

complainant can have a standing in court he must first show that *not only* has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.' Story's Equity Jurisprudence, 14th ed., § 98. The governing principle is 'that whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pomeroy, Equity Jurisprudence, 4th ed., § 397. This Court has declared: 'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' *Bein v. Heath,* 6 How. 228, 247." (Italics supplied.)

Keystone Co. v. Excavator Co. (1933), 290 U. S. 240, 244:

"The authorities and the reason of the rule leave no question as to the right of a Court, and its duty to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself, though the parties to the litigation may not object to such a meretricious exercise of power. If

the public time and the authority of law were thus at the mercy of litigants, the sense of dignity and obligation to the laws, from which the Court derives its powers, would constrain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer."

Valentine v. Stewart (1860), 15 Cal. 387, 405.

"A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto."

Kreamer v. Earl (1891), 91 Cal. 112, 118.

The good faith indispensable to every request for judicial aid is a statutory prerequisite with respect to a petition for arrangement under the Bankruptcy Act.

11 U. S. C. A., Sec. 761, p. 608.

Common honesty and proper respect for the courts and for judicial process left no alternative to clearing the court's docket of the gross deception and imposition here proposed and practiced by Pioneer. Vacation of the restraining order and dismissal of the petition were not only proper, but imperative.

Respectfully submitted,

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